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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 69

J. H. ALLISON & COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions in the court below (R. 128-138) are reported in 165 F. 2d 766. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 33-39, 16-30) are reported in 70 N. L. R. B. 377.

JURISDICTION

The decree of the court below (R. 127) was entered on January 26, 1948. By orders entered on

April 9, 1948 (R. 141) and May 20, 1948 (R. 140) by Mr. Justice Reed the time within which the petition for a writ of certiorari might be filed was extended for forty days. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that the refusal of an employer to bargain with the exclusive bargaining representative of its employees upon request respecting individual merit wage increases constituted a refusal to bargain collectively within the meaning of Section 8 (5) of the Act.

The following additional questions are urged by petitioner but we believe that they are not presented by the record in this case:

1. Whether a court may enforce an order of the Board upon grounds other than those set forth by the Board in its decision.

2. Whether the Board may properly base its finding of an unfair labor practice upon events occurring subsequent to the filing of the charge and the issuance of the complaint, where such events are a continuance of the unfair labor practice alleged in the charge and the complaint.

3. Whether the Board may properly find that an employer has committed an unfair labor practice because during the negotiation of a contract with

the exclusive bargaining representative of its employees the employer declined to assent to a demand of the bargaining representative which demand was thereupon withdrawn and the contract signed without its inclusion.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 29-32.

STATEMENT

Upon a charge duly filed by the Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 402, A. F. of L., hereinafter called the Union, the Board on December 10, 1945, issued its complaint alleging that J. H. Allison & Company, hereinafter called the employer, had on or about May 2, 1945, and at all times thereafter refused to bargain collectively with the Union as the exclusive representative of all the employees in an appropriate unit with respect to merit increases in rates of pay and wages (R. 11-14). The employer filed an answer denying that it had so refused to bargain (R. 14-15). A hearing upon the complaint was held before a trial examiner of the Board on January 21, 1946 (R. 40). On February 8, 1946, the trial examiner issued his intermediate report (R. 16-30) in which he made the following findings:[1]

[1] In the following statement, the references preceding the semicolon are to the trial examiner's findings; succeeding references are to the supporting evidence.

The employer has recognized the Union as the exclusive collective bargaining representative of its employees in an appropriate bargaining unit [2] and has operated under successive contracts with the Union since 1941 (R. 19; 58, 80). These contracts provided for recognition of the Union as exclusive bargaining representative, a form of closed shop, and numerous provisions with regard to hours of work, vacation pay, and other matters not material here (R. 19; 53, 56, 60, 66, 87, 108, 122-124, Bd. Exhs. 3, 4). With regard to wage rates, the contracts provided only for minimum wage scales (R. 19; 53, 56, 122-124). Many of the employees, however, in accordance with their respective skills, were paid higher than the minimum rates (R. 19; 66-68, 70-71). From time to time, the employer and the Union bargained concerning the actual wage rates to be paid to particular classifications of employees and came to oral agreements with respect thereto (R. 19; 62, 67, 70-71, 73-74, 96-97).

Sometime in 1944, the Union filed with the National War Labor Board a request for a general wage increase of 14 cents an hour (R. 19; 63, 71, 99-100). On March 28, 1945, the Regional War Labor Board for the area denied the Union's application (R. 19; 63-65, 89, 98-100, 125-126). Shortly thereafter the employer unilaterally, without con-

[2] The employer stipulated (R. 12-13, 49), and the trial examiner found (R. 18), that the appropriate unit consisted of all production workers, with certain specified exceptions, and that the Union, at all times pertinent, was the duly designated bargaining representative of such employees.

sultation with either the Union or with individual employees, gave approximately thirty-one employees individual wage increases of from one to three cents an hour (R. 19-20; 51-53, 72. 78, 84, 86, 89, 90-91).[3] The individuals receiving the increases learned about them for the first time when the increased amounts appeared on their pay checks (R. 21; 91, 106). At the time of the hearing, there were approximately 110 employees in the appropriate unit (R. 19, n. 1; 96). The employer designated these increases as "merit" increases (R. 19-21; 84, 86, 94, 98), and asserted that such an increase is "based on an individual's performance of his duties; one that is based on his regularity, his loyalty, his willingness to come out and maybe work when things get tight" (R. 20-21; 86), that "an individual merit increase is a reward for increased production or skill" (R. 21; 98). The employer has never issued any statement of policy to the employees generally concerning these merit increases or the basis on which they are made (R. 21, n. 2; 97).

The union representative, upon hearing of these increases, on May 2, 1945, asked the employer to

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[3] The employer explained that the reason it gave this large number at this time was that after the Union filed the application for a 14 cent wage increase in August 1944 all granting of merit increases had been held in abeyance because of the realization that if the War Labor Board approved the Union's application it might have to grant a general increase of 14 cents or part thereof, but when the application was denied it put into effect all the merit increases which would otherwise have been granted during this period (R. 99, 100).

furnish the Union with a list of the employees who had received the increases, and the amounts thereof (R. 19; 52, 92). He told the employer at the time that such information was necessary as a basis for further collective bargaining negotiations on wage rates (R. 19-20; 52-53, 54, 106).[4] The employer refused to furnish this information (R. 20; 52, 53, 54, 63, 78, 94-95). Subsequently, the employer and the Union jointly filed with the War Labor Board an application for approval of an increase in the rate ranges paid to various classifications of employees (R. 20; 63, 66, 88). The War Labor Board approved this application (R. 20; 66, 88), and immediately thereafter the employer unilaterally, and again without notification to the Union, granted further increases to individual employees (R. 20; 88-89, 92-93, 100-101).[5] The Union on several occasions requested the employer to furnish it with information as to these increases but its requests were all refused by the employer (R. 20; 54-56, 78-79, 92-93). The exclusion of the Union from collective bargaining about these increases

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[4] Not only had it been customary for the employer and the Union during the term of the contract to bargain about actual rates paid to employees in excess of the minimums fixed in the contract (R. 19; 62, 67, 70-71, 73-74, 96-97), but the contract expressly provided that twice in any year either party might request a modification of the existing wage structure (R. 53, 56, 122-124).

[5] The employer asserted that only four or five merit increases had been granted between May 1945 and the time of the hearing in January 1946, attributing this small number to the fact that during this period it had put into effect a general wage increase (R. 101).

had a serious effect on the Union's prestige and status because the granting of wage increases to some employees but not to others produced resentment and unrest within the ranks of the Union (R. 22; 52-53, 57, 105-106).[6]

During negotiations leading to the execution of a collective bargaining contract on January 7, 1946, the Union requested the employer to agree to the inclusion in the contract of a clause which would insure the right of the Union to be consulted and informed with regard to merit increases or any other "changes in wages, or material changes in working conditions" so that the Union might be able to bargain with the employer respecting such changes (R. 20, 24; 55, 85-86, 89, 93, 105). The employer refused to agree to the insertion of such a clause and the contract was executed without it (R. 20, 24; 55, 86, 89, 93).[7]

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[6] Some employees even attempted to get the Union to go on strike for the purpose of requiring the employer to inform and consult the Union on merit increases (R. 57).

[7] The union representative testified that the omission of the clause from the contract was based on the express understanding of both the employer and the Union that the respective rights and duties of the parties with regard to merit increases would be determined in this case which was at that time already pending before the National Labor Relations Board (R. 55-56). The Union made it clear that it was not abandoning its position that it had the right to be notified and fully informed of, and bargain about, all merit increases (R. 55-57). The employer representative at the hearing testified he did not "recall" that the Labor Board case was referred to at those conferences (R. 93). The Board found that after the employer refused the Union's request, "The Union then dropped its request, stating that the matter would probably be settled in the proceedings which it had instituted before the Board" R. 34.

Throughout its conferences with the Union and at the hearing before the Board, the employer took the position that merit increases were not a subject about which it was required to bargain collectively and that accordingly the Union was not entitled to be notified, consulted or informed with regard to the number of such increases, their amount or the persons to whom they were granted (R. 20-22, 24; 52, 83-84, 86, 92, 95, 98-99, 119). The employer admitted that whenever the Union or any individual requested a wage increase, it was under a duty to bargain with the Union in respect thereto, but maintained that it had the right in its sole discretion at any time to grant individual increases which were based on its estimate of the worth of the employee and were not negotiated with either the Union or the individual employee (R. 20-22, 24; 83-84, 86, 92, 95, 98-100). The employer also insisted it had the right to withhold from the Union all information as to changes in wage rates made in this manner (R. 20, 22; 45-47, 78, 90).[8] It asserted that, since the Union had a closed shop,

[8] At the time of the hearing before the Board the employer had not yet furnished information to the Union respecting any of the merit increases (R. 56, 71-72) and the Union did not know how many had been given, to whom, or their amounts (R. 72). When Board counsel requested a subpoena for the employer's records or a list of the merit increases in order to prove the instant case, the employer objected on the ground that "the actual furnishing of the list is the very thing, the propriety of which is to be tested in this case" (R. 45-47, 78, 90-91). The employer thereafter stipulated in general terms that it had granted merit increases and the request for the subpoena was denied (R. 78-79).

all the individuals to whom increases were granted were members of the Union and that the Union should get its information as to the increases from them (R. 22; 53, 94). The employer's vice president admitted that he realized some employees might not desire to let the Union know they had received an individual increase in pay (R. 22; 94).[9]

The trial examiner ruled that the Act imposes on an employer the obligation to consult with the duly designated bargaining representative prior to making changes in wage rates and that there was no basis for drawing a distinction between different types of wage increases and holding that some are subject to collective bargaining while others remain a management prerogative (R. 24). He accordingly found that the employer's denial throughout its entire negotiations with the Union that it had an obligation to bargain about merit wage increases and its continued insistance that such increases were matters solely within its discretion, to be resolved by it and by it alone, constituted a refusal to bargain collectively (R. 24). He further found that since merit increases were a proper subject for collective bargaining, it was

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[9] The stenographic notes of the conference between the employer and the Union on July 18, 1945, show that the employer's vice president, McCall (R. 20, 80), used as an excuse for not giving the Union the list requested that some of the employees "don't care about having what they make broadcast and made public information" (R. 94). At the hearing the employer argued that in view of the Union membership of each employee who received an increase, the notice to the employee was notice to the Union (R. 95, cf. 85).

the responsibility of the employer to furnish the Union information respecting these increases (R. 22). He therefore concluded that the employer had committed unfair labor practices in violation of Section 8 (1) and (5) of the Act (R. 24-25, 26-27).

The employer thereafter filed exceptions to certain of the findings of fact, conclusions of law and recommendations contained in the intermediate report (R. 30-32). It did not except on the ground that certain of the findings were based on events transpiring subsequent to the date of the issuance of the complaint or otherwise exceeded the scope of the pleadings.

The Board on August 26, 1946, issued its decision and order in which it adopted the findings, conclusions and recommendations of the trial examiner with certain exceptions, additions and modifications (R. 33). The Board agreed fully with all the trial examiner's findings respecting the events which he described in his intermediate report. And it also agreed with his conclusion that the employer was required to bargain with the Union as to merit increases (R. 34-35). It stated (R. 34):

> * * * we agree with the Trial Examiner that the [employer] has not fulfilled its obligation to bargain collectively with the Union. We find no merit in the [employer's] contention that merit increases are a prerogative of management. Like the Trial Examiner, we

> are of the opinion that merit increases are an integral part of the wage structure, and as such, constitute a proper subject for collective bargaining.

The only material respect in which the Board departed from the trial examiner's findings and conclusions appears in the following two sentences of its decision (R. 34-35):

> * * * In concluding that the [employer] has violated its duty under Section 8 (5), however, we find it unnecessary to determine whether the [employer] was under an obligation to bargain concerning merit increases during the term of the 1945 contract which the Union had entered into without provision therein for merit increases in the wage structure, although the practice of granting merit increases upon a unilateral basis had existed for a number of years. We base our finding of a refusal to bargain upon the [employer's] failure during the formulation of the 1946 contract to negotiate concerning merit wage increases, a proper subject of collective bargaining, and upon the [employer's] continuing refusal to furnish to the Union information concerning merit increases which had been granted, information necessary to the Union in order for it adequately to represent the employees on the subject of merit increases.

The Board ordered the employer to cease and desist from refusing to bargain collectively with the Union with respect to merit wage increases,

upon request so to bargain with the Union, upon request to furnish the Union full information with respect to merit wage increases, including the number of such increases, the amount of such increases, and the standards employed in arriving at such increases, to refrain from granting merit wage increases without prior consultation with the Union, and to post appropriate notices (R. 35-38). Board member Reilly dissented (R. 38-39).

The Board filed a petition for enforcement of its order in the court below (R. 1-5), and on January 26, 1948, the court, with one judge dissenting, handed down its opinion (R. 128-138) and entered its decree (R. 127) enforcing in full the Board's order. It agreed with the Board that "by virtue of the National Labor Relations Act the obligation of the employer to bargain collectively with representatives of its employees with respect to wages, hours and working conditions, includes the duty to bargain with such representative concerning individual merit increases. The labeling of a wage increase as a gratuity does not obviate the fact that a gratuitous increase on the basis of merit does, in actuality, effectuate changes in rates of pay and wages, which are by the Act made the subject of collective bargaining" (R. 132). The court pointed out that, irrespective of whether the Union's demand during the term of the 1945 contract was unseasonable, by renewing its demand during negotiations for the 1946 contract, the Union had adequately asserted its claim to bargain

about merit increases (R. 131). The court also ruled that in view of the employer's continued insistance that it would not negotiate or bargain with the Union about merit wage increases until ordered so to do, the Union did not waive its rights to bargain about such increases by entering into a contract which was silent upon this controverted matter (R. 131).

ARGUMENT

1. The decision below that the National Labor Relations Act imposes on an employer the obligation to bargain collectively with respect to individual merit wage increases is in accord with principles recognized in (R. 132-137) decisions of this Court and of the Circuit Courts of Appeals. There are no conflicting decisions. There is, therefore, no need for further review.

Quite apart from the uniform decisions of this and other courts, the language of the Act itself affords full support for the decision of the Board and the court below. Section 9 (a) provides that:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

The employer's position in this case, asserted in all conferences with the Union (R. 52, 54-55, 63, 94-95), at the hearing before the Board (R. 83-84, 86, 94-95, 98-99, 119), and in the court below (R. 131-132), has been that the statute did not contemplate that all rates of pay and wages should be the subject of collective bargaining but only those adjustments in pay rates which the employer was willing to "negotiate" or "compromise" (R. 98), not those which the employer increased as a "gratuity" (R. 119, 132) based on the "merit" (R. 83, 132) of an employee. The Act, however, contains no such exception. And this Court in its decisions has made it clear why no exception is to be implied for either unilateral employer action or the granting of special advantages to individual employees. In *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 376, this Court held that an employer committed an unfair labor practice when it unilaterally, without consulting the bargaining agent, requested permission from the National War Labor Board to increase wages. There this Court stated (at pp. 384-385):

> * * * Employer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot, we think, logically or realistically, be distinguished from bargaining with individuals or minorities. * * *
>
> * * * Such unilateral action minimizes the in-

> fluence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.

Earlier this Court had rejected employer contentions that benefits granted employees justified disregard of the bargaining agent. In *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, this Court pointed out (at pp. 338-339):

> * * * The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. * * * advantages to individuals may prove as disruptive of industrial peace as disadvantages. They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole.

In *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.,* 321 U. S. 342, this Court, in finding that the employer's change in the wage rates of certain individual employees constituted a violation of the duty to bargain with the collective agent imposed by the Railway Labor Act, stated at pp. 346-347):

> exceptional situations often have an importance to the whole because they introduce

> competitions and discriminations that are upsetting to the entire structure. Hence effective collective bargaining has been generally conceded to include the right of the representatives of the union to be consulted and to bargain about the exceptional as well as the routine rates * * *

Similarly, see *Medo Photo Supply Corp.* v. *National Labor Relations Board,* 321 U. S. 678. The holdings of the various Circuit Courts of Appeals are uniformly in accord: *Singer Mfg. Co.* v. *National Labor Relations Board,* 119 F. 2d 131, 137 (C.C.A. 7), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *Louisville Refining Co.,* 102 F. 2d 678, 680-681 (C.C.A. 6), certiorari denied, 308 U. S. 568, enforcing 4 N. L. R. B. 844, 859-861; *Oughton* v. *National Labor Relations Board,* 118 F. 2d 486, 492-493, 498 (C.C.A. 3), certiorari denied, 315 U. S. 797; *Aluminum Ore Co.* v. *National Labor Relations Board,* 131 F. 2d 485, 487 (C. C. A. 7); *Consolidated Aircraft Corp.* v. *National Labor Relations Board,* 141 F .2d 785, 787 (C.C.A. 9).

The record in this case shows a particularly flagrant instance of an employer's refusal to permit the bargaining agent to participate in determining the wage structure. Individual increases were here granted to approximately a third of the employees in the unit—thirty-six out of some one hundred and fifteen employees (R. 19-20; 90, 93, 100) without participation or even notice to the Union. At the

hearing the employer impliedly conceded the relation of these increases to the general wage structure by explaining that the thirty-one increases granted following the denial by the War Labor Board of the Union's application for a 14 cents an hour wage increase would not have been given if a general wage increase had been put into effect (R. 99, 100), and that only four or five were granted during the succeeding half year because of a general wage increase during that period (R. 101). As the employer was aware, the granting of increases to some employees and not to others caused resentment and unrest among the employees (R. 22; 52-53, 57, 105-106). There were even employees who seriously urged the Union to call a strike because of this conduct of the employer (R. 57).[10] Yet the employer never explained either to the employees or to the Union the policy or basis upon which these increases were granted (R. 21, n. 2; 97). Moreover, the employer during negotiations of a subsequent collective bargaining agreement refused to agree to the insertion of a clause which would have recognized the right of the Union to be informed and bargain about all changes

[10] Students of labor-management relations in studying the effect of unilateral action by employers in disregard of the duly designated bargaining representative have found that unilateral conferrals of benefits have been productive of strikes. Chamberlin, Neil, *The Nature and Scope of Collective Bargaining*, 58 Quar. Journ. Econ. 375-376, ns. 3, 4 (May 1944); Golden, Clinton S., and Ruttenberg, Harold J., *The Dynamics of Industrial Democracy* (Harpers, 1942), pp. 100-101; Twentieth Century Fund, *How Collective Bargaining Works* (New York, 1942), pp. 553, 680-681, 799-800.

in pay (R. 55, 85-86, 89, 93). The employer insisted then, and at all times since has continued to insist, that it has the right to make such individual changes in pay rates in the future as it has in the past in complete disregard of the Union (R. 94-95, 131-132).

In this Court the employer argues that these increases are merely "gifts" to its employees and that there is no law which imposes on the employer a duty to bargain about the gifts it may desire to make (Pet. 15-16). But these increases are unmistakably compensation for services. Once granted, they become part of the employer's obligation to the employee. For each hour that he works thereafter the employer is legally required to pay at the new rate. The employee could sue and recover should the employer without notice to the employee at any time decide to omit the amount of the increase from future pay checks. If the increased amount was actually a gift no such legal result would ensue. As the court below stated (R. 132):

> The labeling of a wage increase as a gratuity does not obviate the fact that a gratuitous increase on the basis of merit does, in actuality, effectuate changes in rates of pay and wages, which are by the Act made the subject of collective bargaining.

Nor can the employer validly contend that because the wage increases were based on the merit

of the employee no useful function could be served by the employees' bargaining agent in connection therewith. Certainly, the Union could make suggestions for the setting of standards which would enable all employees to compete for such raises on an even footing and with full knowledge of what was expected of them, thereby diminishing the tensions and dissatisfactions which flow from a policy of individual wage adjustments which are based upon undisclosed and uncertain standards.

Upon this record there can be no doubt but what the Board and the court below correctly held that the employer had refused to bargain collectively in violation of Section 8 (5) of the Act. No difficult or novel questions lurk in this holding. It is in full accord with the language of the Act and with the established and uniform precedents of this and other courts.

2. We believe that the foregoing question is the only one urged in the petition which is properly presented by the record in this case. The employer's question numbered "(1)", "Can the Circuit Court of Appeals grant an enforcement order to the National Labor Relations Board on grounds other than those cited by the National Labor Relations Board in its findings?" (Pet. 2), is based on an inaccurate reading of the decisions of both the Board and the court below. In fact the opinion of the Board and the court are entirely clear and unambiguous. There is not the slightest basis for

any doubt but what the court below fully approved the grounds upon which the Board based its decision and added no additional or different grounds.

The employer begins its analysis by labeling as Grounds One and Two, what it asserts were in "effect" the grounds of the trial examiner's ruling (Pet. 5). Ground One it states was the refusal "to furnish the list in May 1945" and Ground Two the refusal "to include a clause making merit increases the subject of bargaining in the 1946 contract" (Pet. 5). However, it was neither the refusal to furnish the list nor the refusal to insert the clause requested, as such, which the trial examiner found constituted the refusal to bargain. Rather it was the employer's refusal to observe the obligation which the Act imposes on it to consult with and inform the Union prior to making changes in wage rates. The trial examiner so expressly states twice in his intermediate report. Thus, he concludes the section of the intermediate report entitled "The unfair labor practices" with the following finding (R. 24):

> * * * [The employer's] denial throughout its entire negotiations with the Union that such an obligation existed and its continued insistence that this problem of merit increases was a matter solely within the discretion of the [employer], to be resolved solely by it and it alone, constituted a refusal to bargain, and the undersigned so finds.

Then again in the section of the intermediate report entitled "The remedy" he refers to his earlier finding as follows (R. 25):

> It has been found that the [employer] has refused to bargain with the Union by its insistence, despite the Union's request to be consulted on this subject, that the subject of merit increases was not a matter for collective bargaining and one in which it could act completely unilaterally without consulting with the Union.

The employer continues its analysis by measuring the decision of the Board and the court below in terms of their supposed treatment of what the employer has asserted were Grounds One and Two of the trial examiner's ruling (Pet. 6, 8-9, 10, 11-12). It accuses the Board of abandoning the trial examiner's Ground One and of basing its decision solely on his Ground Two (Pet. 6, 8, 9, 11, 12). But the Board neither disagreed with the trial examiner that the employer had a duty to inform the Union of all its changes in wage rates nor agreed with any supposed finding that the refusal to include a clause on merit increases in the 1946 contract constituted a refusal to bargain. It fully agreed with the trial examiner that the employer had a duty to bargain with the Union about merit increases which included an obligation to inform the Union fully of all merit increases. Where the Board differed with the trial examiner was in its

failure to rule as to whether the employer's refusal to bargain about merit increases and to inform the Union in respect thereto during the term of a contract dealing with wages but silent on the issues in dispute constituted an unfair labor practice. Whereas the trial examiner found that the assertion by the employer of its position as to merit increases on May 2, 1945 constituted a refusal to bargain (R. 24-25, 26), as did its subsequent assertions of this position on numerous occasions thereafter (R. 24-25, 26), including its assertions during the negotiations for the 1946 contract (R. 20, 24, 26), the Board based its findings of a refusal to bargain only on the employer's assertion of its position during the negotiations for the 1946 contract and thereafter (R. 34-35). The Board stated (R. 34-35):

> In concluding that the [employer] has violated its duty under Section 8 (5), however, we find it unnecessary to determine whether the [employer] was under an obligation to bargain concerning wage increases during the term of the 1945 contract which the Union had entered into without provision therein for merit increases in the wage structure, although the practice of granting merit increases upon a unilateral basis had existed for a number of years. We base our finding of a refusal to bargain upon the [employer's] failure during the formulation of the 1946 contract to negotiate concerning merit wage increases, a proper

> subject of collective bargaining, and upon the [employer's] continuing refusal to furnish to the Union information concerning merit wage increases which had been granted, information necessary to the Union in order for it adequately to represent the employees on the subject of merit increases.

The employer in measuring the decision of the court below in terms of its treatment of Grounds One and Two, asserts that the court based its holding on both Grounds One and Two, thus differing from the Board which supposedly adopted only Ground Two (Pet. 8, 9-10, 11, 12). But the court below did not adopt either Ground One or Ground Two as defined by the employer (Pet. 5), any more than did the Board. And like the Board the court below too deemed it unnecessary to decide whether the employer's conduct during the term of the 1945 contract constituted an unfair labor practice. It pointed out that the alleged "unseasonableness of the demand on May 2, 1945" could not dispose of the case because "the demand for the information was renewed later during the negotiations for the 1946 contract. Moreover, the constant position of [the employer] has been and now is that merit increases are not, under the National Labor Relations Act, a proper subject for collective bargaining; and that the company will not negotiate or bargain with the union upon the subject until 'ordered so to do by final authority' " (R. 131). The

court below accurately recited the grounds for the Board's decision. It pointed out that (R. 130):

> * * * The refusal of [the employer], during the formulation of the 1946 contract, to negotiate with the union concerning merit wage increases and to furnish information upon the subject so that the union could adequately represent the employees, was declared to be the basis of the Board's finding that [the employer] had refused to bargain within the meaning of section 8 (5) of the Act.

The rest of the court's opinion (R. 130-137) is devoted to answering the attacks made on this holding and to demonstrating that it is fully supported by authority. At no place in its opinion does the court suggest either expressly or impliedly any disagreement or deviation by it from the grounds given by the Board.

We believe, therefore, that the employer's question numbered "(1)" as set forth in its petition (p. 2) is not presented by the record in this case.

3. The employer's question numbered "(2)", "Under the National Labor Relations Act, can an employer be found guilty of an unfair labor practice on the basis of facts which occurred after the filing of the charge and the issuance of the complaint, but before the hearing of the case?" (Pet. 2), is likewise not properly before this Court. This question is based on the employer's contention that the Board could not properly base its decision

on events occurring during the negotiation of the 1946 contract because these events occurred subsequent to the filing of the charge and complaint (Pet. 12-13). When evidence respecting the negotiation of the 1946 contract was introduced the employer did not object thereto (R. 55, 85-86, 89, 93). Although the trial examiner in his intermediate report made findings with respect to the negotiations for the 1946 contract and based his determination that the employer had committed an unfair labor practice in part on these findings (R. 20, 24-25), the employer in its exceptions to the intermediate report included no challenge to these findings on the ground that they were based on events occurring subsequent to the charge and complaint (R. 30-32). Section 10 (e) of the Act precludes consideration by a court of an objection that has not been urged before the Board. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385. Nor was this question argued or even mentioned in the employer's brief filed in the court below.

Moreover, the findings based on the events occurring during the negotiation of the 1946 contract were clearly within the scope of the complaint. It alleged that "On or about May 2, 1945, and at all times thereafter, [the employer] did refuse and continues to refuse to bargain collectively with the Union * * * with respect to merit increases in rates of pay and wages" (R. 13). The findings of

events during the negotiation of the 1946 contract showed a continuing refusal after May 2, 1945, to bargain respecting merit increases.

4. The employer's question numbered "(3)", "Is an employer guilty of refusal to bargain with a union when, in the negotiation of a contract, the union makes a demand to which the employer declines to assent, and the union then withdraws the demand and proceeds to execute a contract?" (Pet. 2), again assumes that the Board and the court below ruled that the employer was guilty of an unfair labor practice because it refused to include in the 1946 contract the clause requested by the Union (Pet. 5, 6, 13-14). Neither the trial examiner, the Board, nor the court below so much as suggested that the employer was under any obligation to include the clause requested in any contract or that its refusal so to do constituted an unfair labor practice. It was rather the employer's adamant position that the subject matter dealt with in the requested clause, namely, merit increases, was not within the scope of collective bargaining, which was found to constitute the refusal to bargain (R. 24, 25, 34-35, 131). The refusal to include a given clause or even any clause at all on the subject is obviously an entirely different thing from the refusal even to consider or negotiate about a clause on the ground it deals with a subject about which the employer refuses to bargain.

The employer's question numbered "(3)" also assumes that the Union withdrew its demand for bargaining about merit increases. The record does not support such an assumption. Nor is a withdrawal to be implied because the Union signed the contract without the requested clause. As the Board found (R. 34), when the Union signed the contract without the clause it pointed out to the employer that the issue of its right to bargain about, and be informed as to, merit increases was then pending for decision before the Board (R. 55-57). Instead of indicating any abandonment of its rights, this shows that the Union was willing to abide by orderly legal processes to determine its rights. And the court below very correctly noted that any interpretation of the Union's conduct as a withdrawal of its demand would mean that unions must refrain from signing contracts in order to preserve their position, a result which "would seem to be disruptive rather than fostering in its effect upon collective bargaining" (R. 131).

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct and presents neither a conflict of decision nor any new or novel questions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY, 1948.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * *

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce * * *.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial dis-

putes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * * * *

[SEC. 10] (e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person,

and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

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